

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 JERMAINE HICKLES,

CASE NO. C19-1398-JCC

10 Petitioner,

ORDER

11 v.

12 UNITED STATES OF AMERICA,

13 Respondent.
14

15 This matter comes before the Court on Petitioner Jermaine Hickles's motion to vacate, set
16 aside, or correct his sentence, under 28 U.S.C. § 2255 (Dkt. No. 1). Having reviewed Petitioner's
17 motion, the Court hereby DISMISSES Petitioner's fifth ground for relief and ORDERS service
18 and an answer on the remaining grounds.

19 Petitioner pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C.
20 § 922(g)(1); possession with intent to distribute methamphetamine, in violation of 21 U.S.C.
21 §§ 841(a)(1) and 841(b)(1)(C); and possession of a firearm in furtherance of a drug trafficking
22 crime, in violation of 18 U.S.C. § 924(c)(1)(A). *See United States v. Hickles*, Case No. CR18-
23 0015-JCC, Dkt. Nos. 22, 24 (W.D. Wash. 2018). On August 14, 2018, Petitioner was sentenced
24 to 84 months of imprisonment, followed by three years of supervised release. *Id.* at Dkt. No. 35.

25 Before directing service and answer to a habeas corpus petition, the Court must determine
26 whether the motion, the files, and the records of the case "conclusively show that the prisoner is

1 entitled to no relief.” 28 U.S.C. § 2255(b). In his plea agreement, Petitioner “waived “[a]ny right
2 to bring a collateral attack against the conviction and sentence, including any restitution order
3 imposed, except as it may relate to the effectiveness of legal representation.” *Hickles*, Case No.
4 CR18-0015-JCC, Dkt. No. 22 at 13. Petitioner raises five potential grounds for relief:
5 (1) ineffective assistance of counsel during the plea negotiation process; (2) ineffective
6 assistance of counsel for failure to properly challenge charges; (3) ineffective assistance of
7 counsel for failure to explain the importance of waiving appellate rights; (4) involuntariness of
8 his plea agreement; and (5) an unconstitutional sentence imposed under 924(c)(1)(A). (Dkt. No.
9 1-1 at 4–13.)

10 Petitioner’s plea agreement waives any right to bring a collateral attack, “except as it may
11 relate to the effectiveness of legal representation.” *See Hickles*, Case No. CR18-0015-JCC, Dkt.
12 No. 22 at 13. Petitioner’s first, second, and third grounds for relief assert ineffective assistance of
13 counsel, and the record does not conclusively show that Petitioner is entitled to no relief.
14 Therefore, service is proper as to Petitioner’s three grounds for relief based on ineffective
15 assistance of counsel.

16 The Ninth Circuit has upheld the enforceability of a knowing and voluntary waiver of the
17 right to bring a collateral attack for pre-plea constitutional violations. *See United States v.*
18 *Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993). However, such a waiver does not preclude a
19 § 2255 claim for involuntariness of a waiver in a plea agreement. *Id.* In this case, the record does
20 not conclusively show that Petitioner is entitled to no relief on this ground. Therefore, service is
21 proper as to Petitioner’s fourth ground for relief.

22 Although a petitioner is generally precluded from challenging sentencing errors on a
23 § 2255 petition, “[e]xception has frequently been made for constitutional questions.” *See United*
24 *States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994). Petitioner claims that his sentence under
25 § 924(c)(1)(A) for firearm possession in furtherance of a drug trafficking crime is
26 unconstitutional because the definition of “crime of violence” in § 924(c)(3)(B) is

1 unconstitutional under *United States v. Davis*, 139 S. Ct. 2319 (2019). (Dkt. 1-1 at 13.) But the
2 record shows that Petitioner pled guilty to firearm possession in furtherance of a drug trafficking
3 crime, not a crime of violence. *See Hickles*, Case No. CR18-0015-JCC, Dkt. No. 22 at 2. Drug
4 trafficking crime is defined under 28 U.S.C. § 924(c)(2) and is not the same definition as
5 § 924(c)(3)(B), which was held unconstitutional in *Davis*. *See Davis*, 139 S. Ct. at 2323–24.

6 Thus, the record conclusively shows that Petitioner is entitled to no relief on this ground.

7 Therefore, service on ground five is improper and this ground is DISMISSED.

8 Accordingly, the Court hereby ORDERS as follows:

- 9 1. The Clerk is DIRECTED to send a copy of this order to Petitioner.
- 10 2. If not previously accomplished, electronic posting of this order and petition shall
11 effect service upon the United States Attorney of copies of the § 2255 motion and of
12 all documents in support thereof.
- 13 3. Within 45 days after such service, the United States shall file and serve an answer in
14 accordance with Rule 5 of the Rules Governing Section 2255 Cases in United States
15 District Courts. As part of such answer, the United States should state its position as
16 to whether an evidentiary hearing is necessary, whether there is any issue as to abuse
17 or delay under Rule 9, and whether Petitioner’s motion is barred by the statute of
18 limitations.
- 19 4. On the face of the answer, the United States shall note the answer for consideration
20 by the Court on the fourth Friday after it is filed, and the Clerk shall note the answer
21 accordingly. Petitioner may file and serve a reply to the answer no later than that
22 noting date.

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1 DATED this 18th day of December 2019.

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5 John C. Coughenour
6 UNITED STATES DISTRICT JUDGE
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